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No. 92-1798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LEE RAKESTRAW, *et alia*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and UNITED AIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION *and* BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, URGING THAT A WRIT OF CERTIORARI BE ISSUED

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Pursuant to Rule 37.2 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners, urging that a writ of certiorari be issued. Respondent Air Line Pilots Association, International ("ALPA") has refused to consent to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation ("Foundation") is a non-profit, charitable organization formed to provide free legal assistance to individual employees who, as a consequence of their subjection to compulsory-unionism arrangements, have suffered violations of their right to work; freedoms of association, speech, and religion; right to procedural due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States.

To this end, the Foundation has supported major constitutional cases involving the right of employees to avoid compulsory-unionism arrangements, including *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. BRAC*, 466 U.S. 435 (1984); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Association*, ____ U.S. ____, 111 S. Ct. 1950 (1991). The Foundation has also supported landmark litigation to protect the rights of employees under the "duty of fair representation", such as *CWA v. Beck*, 487 U.S. 735 (1988). In addition, the Foundation is even now supporting lawsuits specifically against ALPA (and in some instances respondent United Air Lines also)—including *Krantz v. ALPA*, No. L-108865 (Cir. Ct., Fairfax Cty., Virginia); *Belena v. ALPA*, No. L-121111 (Cir. Ct., Fairfax Cty., Virginia); *Falcon v. ALPA*, No. L-12113 (Cir. Ct., Fairfax Cty., Virginia); *Crawford v. ALPA*, No. 88-2083 (4th Cir., *en banc* decision handed down 28 April 1993); and *Beckett v. ALPA*, No. 92-7029 (D.C. Cir., oral argument held 20 April 1993).

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Court of Appeals for the Seventh Circuit would (in that Circuit) and could (as a precedent applied in other jurisdictions) seriously undermine the duty of fair representation, thereby radically expanding the occasions and ambit for injustices arising out of compulsory unionism.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

The Foundation recognizes that petitioners will ably argue their own personal interests in having this Court issue a writ of certiorari. Yet, by naturally focussing on their own circumstances, petitioners may not sufficiently emphasize aspects of the Court of Appeals' decision that flagrantly disregard the *constitutional* genesis and thrust of the duty of fair representation. Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the significance of the Court of Appeals' decision, and on the need for this Court's review of that decision by writ of certiorari.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

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INTRODUCTION

Pursuant to a motion, annexed hereto, for leave to file under Rule 37.2 of the Rules of this Court, the National Right to Work Legal Defense Foundation ("Foundation") submits this brief *amicus curiae* in support of petitioners, urging that a writ of certiorari be issued.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be granted, because the Court of Appeals has reduced to a single *de minimis* "rational-basis" test the tripartite standard of "arbitrary, discriminatory, or bad-faith" conduct that this Court has applied in every duty-of-fair-representation ("DFR") case from *Steele*[1] through *O'Neill*.[2] Moreover, inasmuch as the conduct of respondent Air Line Pilots Association ("ALPA") was found to have been undertaken both for a discriminatory purpose and in bad faith, in retaliation against petitioners for their exercise of the fundamental First-Amendment right not to associate with the union in a strike, the Court of Appeals' contraction of the DFR to a mere "rational-basis" standard draws into question the constitutionality of the Railway Labor Act's scheme of exclusive representation,[3] as this Court in *Steele* long ago warned would occur if a meaningful DFR were not interpolated into the statute.[4]

Unless reversed here, the Court of Appeals' decision will predictably foster attempts by unions to trivialize the DFR, to the detriment of all employees whose subjection to exclusive representation exposes them to the ill will of union officials or groups of co-workers who influence union policies.

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[1] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[2] ALPA v. O'Neill, __ U.S. __, 111 S. Ct. 1127 (1991).

[3] Section 2, Fourth, 45 U.S.C. § 152, Fourth.

[4] *See* 323 U.S. at 198-99.

ARGUMENT

The petition for a writ of certiorari should be granted, because the Court of Appeals' decision reduces to a toothless test of "mere rationality" the tripartite standard of "arbitrary, discriminatory, or bad-faith" conduct that this Court has mandated in its DFR cases from *Steele* through *O'Neill*—with three principal unacceptable effects:

◆ *First*, the Court of Appeals' decision resolves "a federal question in a way that conflicts with applicable decisions of this Court"[5] in a manner that reflects a callous disregard, or even disdain, for this Court's reasoning.[6]

◆ *Second*, unless reversed, the Court of Appeals' decision will particularly aid and comfort unions intent on misusing their powers of exclusive representation[7] to discriminate invidiously against nonunion or dissident union-member employees, as ALPA did here.

◆ *And third*, unless reversed, the Court of Appeals' decision—and the promotion of it by self-interested unions—will likely infect the general run of DFR cases throughout the country, undermining to the point of collapse that duty as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law",[8] and thereby drawing into most serious

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[5] Rule 10.1(c) of the Rules of this Court.

[6] *E.g.*, the Court of Appeals repeatedly denigrates this Court's tripartite DFR standard as composed of mere "conclusions", "epithets", "labels", "buzzwords", "slogans", and "empty" terminology. *See* Rakestraw v. United Air Lines, 981 F.2d 1524, 1530, 1532, 1533 (7th Cir. 1992).

[7] Under Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth; and National Labor Relations Act § 9(a), 29 U.S.C. § 159(a).

[8] Vaca v. Sipes, 386 U.S. 171, 183 (1967).

question the constitutionality of the Railway Labor Act's scheme of exclusive representation.

I. The Court of Appeals eviscerates the tripartite standard that this Court has mandated in its duty-of-fair-representation cases from *Steele* through *O'Neill*.

A. The Court of Appeals' decision destroys the tripartite DFR standard by double-minded reasoning:

◆ On the one hand, the Court of Appeals concedes that the alleged "rationality" of ALPA's actions is not enough to immunize the union from a DFR claim—because, although "'[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit'", the union must always act "'in complete good faith and [with] honesty of purpose in the exercise of its discretion'", and "'owes complete loyalty to the interests of *all* who it represents'", "'without hostility to any'".[9] Moreover, the Court of Appeals recognizes that ALPA may not "take away the seniority of some employees for no reason other than * * * that they opposed the union's leadership", that ALPA "may not sell an employee down the river * * * for a reason forbidden on substantive grounds, such as * * * internal union politics", and that "[e]mployees have a statutory right * * * freely to oppose unions * * * , so the organized workers may not penalize those who prefer individual to collective decision-making".[10] And the Court of Appeals admits *sotto voce* that ALPA did, in fact, impose "a penalty" on the Group of 539 to which petitioners belonged.[11]

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[9] 981 F.2d at 1530, *quoting* Ford Motor Co. v. Huffman, 345 U.S. 330, 337, 338 (1953) (emphasis in original).

[10] 981 F.2d at 1530.

[11] *Id.*

◆ On the other hand, however, the Court of Appeals argues that a "penalty" is permissible if the union's acts "may be characterized * * * as *normal efforts to provide a level playing field for all workers*"[12]—and, through a distortion of *O'Neill*, concludes that ALPA's discrimination against petitioners may be so "characterized" if "a rational person might believe" that that discrimination "serve[d] the interest[s] of the [bargaining-unit] as a whole" and was "rationally related to a legitimate [union] objective".[13] The Court of Appeals then disregards the findings of the District Court—"none of which", it admits, "is clearly erroneous"[14]—that ALPA acted discriminatorily and in bad faith towards petitioners, and accepts the grounds ALPA asserts for that malevolent discrimination as "rational" on the basis of shopworn slogans from the ideology of compulsory unionism.

Thus, overall, the Court of Appeals affects concern for the DFR, while disembowelling it. Although this Court's tripartite standard requires separate inquiry into "arbitrary", "discriminatory", and "bad-faith" union conduct, the Court of Appeals' decision licenses a miscreant union to dodge liability if its lawyers can caricature a "rational person" who "*might* believe" that the union was advancing some amorphous, question-begging goal such as "the solidarity of labor"[15]—even if, as proven here, "ALPA's leadership * * * detested the strike-breakers and wanted revenge, by means fair or foul"; and "[t]his loathing played a role in the union's efforts to increase the seniority of the Group of 570, which would demote the fleet qualified pilots".[16]

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[12] *Id.* (emphasis supplied). Of course, this merely poses the further question of what constitutes such "normal efforts".

[13] *Id.* at 1532.

[14] *Id.* at 1534.

[15] *See id.* at 1532 (emphasis supplied).

[16] *Id.* at 1534.

B. No fair reading of *O'Neill* licenses such indulgence. *O'Neill* explicitly held that "a union breaches its duty of fair representation if its actions are *either* 'arbitrary, discriminatory, *or* in bad faith' ", adding that this Court "ha[s] repeatedly identified *three* components of the duty".[17] Although *O'Neill* found no "arbitrary" conduct under the facts there presented, it treated challenges to ALPA's allegedly "discriminatory" and "bad-faith" conduct as *separate* issues.[18] Moreover, although *O'Neill* held in principle that a union's conduct is "arbitrary" "only if it can be fairly characterized as so far outside a 'wide range of reasonableness' * * * that it is wholly 'irrational' ", in practice it emphasized "the importance of evaluating the rationality of a union's decision in the light of both the facts and the legal climate that confronted the negotiators at the time the decision was made"[19]—a technique the Court of Appeals eschews, and that could hardly support its decision, where the contemporary facts showed that "ALPA's leadership * * * detested the strike–breakers and wanted revenge", where the replacement pilots "were harassed in and out of the cockpits—with the active and thoroughly illegal support of ALPA's leadership", and where "ALPA paid through the nose for a change in the seniority table" discriminatorily disfavorable to petitioners.[20]

II. The Court of Appeals has no basis for applying only an "arbitrariness" test to ALPA's conduct, as the record establishes discrimination and bad faith beyond peradventure.

The Court of Appeals' limitation of its DFR analysis to the "arbitrariness" test is inexplicable, because the record overwhelmingly evidences ALPA's discriminatory purpose and bad faith.

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[17] __ U.S. at __, __, 111 S. Ct. at 1130, 1134 (emphasis supplied).

[18] *See id.* at ___ n.6, ___, 111 S. Ct. at 1133 n.6, 1137.

[19] *Id.* at __, 111 S. Ct. at 1136.

[20] 981 F.2d at 1534, 1529, 1536.

A. ALPA's *vendetta* against petitioners exhibits the razor-sharp outlines of a melodrama oozing with perceived betrayal, hatred, and revenge—a dissonant *Cavelleria Rusticana* of "the friendly skies". After the union duplicitously "took the best offer United [Air Lines] was willing to make",

> ALPA's leaders promised guerrilla warfare against the fleet qualified replacement pilots, and, if need be to get the 219 replacements, against the entire Group of 539, even though the 320 student pilots had not crossed the picket lines. The 219 were harassed in and out of the cockpits—with the active and thoroughly illegal support of ALPA's leadership * * * .[21]

> ALPA's leadership * * * detested the strike–breakers and wanted revenge, by means fair or foul. This loathing played a role in the union's efforts to increase the seniority of the Group of 570, which would demote the fleet qualified pilots. Giving the Group of 570 seniority from May 17, 1985, *also* demoted the 320 trainees, none of whom crossed the picket lines and many of whom have joined the union, but * * * the union was willing to pay this price to get back at the reviled 219 replacement pilots.[22]

Indeed, ALPA so "detested", "loath[ed]", and "reviled" the 219 replacement pilots (including petitioners) that it "paid through the nose for a change in the seniority table", forking over to United "concessions worth $200 million"[23]—also at the expense, of course, of the hated 219 replacement pilots it intended especially to injure.

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[21] *Id.* at 1529.

[22] *Id.* at 1534 (emphasis in original).

[23] *Id.* at 1536, 1529.

To say (as does the Court of Appeals) that characterizing ALPA's conduct as "discriminatory" is at best to "invok[e] a slogan"[24] turns a blind eye to this salient reality.

B. ALPA's and its members' conduct also reeks with cynically calculated bad faith. Although, in accepting "the best offer United was willing to make",

> ALPA promised that "it will never seek to challenge [United's] action...in court or before an arbitrator, nor will it seek to raise the issue of the 'Group of 570' relative seniority position as part of any future negotiations...regarding any subject whatsoever"[,][25]

ALPA never intended to abide by its word—instead, immediately "promis[ing its members] guerrilla warfare against the fleet qualified replacement pilots", giving "active and thoroughly illegal support" to harassment of the 219 replacements, and at its first opportunity in renewed negotiations with United "rais[ing] the issue of the 'Group of 570' relative seniority" to the planned detriment of petitioners.

Moreover, the influential union members whose "[r]ancor * * * drove ALPA and United back to the [negotiating] table"—the Group of 570—were no more disposed to honor their pledges than was ALPA. Although "[e]very working member of the Group of 570 signed a document releasing both United and ALPA from all liability" for the initial agreement that waived further negotiations on their seniority, the Group of 570's later obstreperous misbehavior finally forced United to "c[o]me around to the view that efficient operation of the airline required peace

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[24] *Id.* at 1532-33.

[25] *Id.* at 1528-29.

with ALPA, and that the price of peace was to reverse the seniority positions of the Groups of 570 and 539".[26]

To say (as does the Court of Appeals) that characterizing this conduct as undertaken in "bad faith" is not useful because "[s]logans can be mustered on all sides"[27] is to pretend that the cause of peace cannot be served by identifying the aggressor in a conflict.

III. The Court of Appeals' claim that ALPA's conduct was "rational" rests on mere slogans.

Although the Court of Appeals inveighs against the use of "slogans", "labels", "buzzwords", "epithets", and other "empty" terminology when impugning this Court's tripartite DFR standard,[28] it itself seizes on the merest of slogans to color ALPA's actions as "rational". This approach is improper, for two reasons:

A. *First*, the DFR is of *constitutional* dimension. In *Steele*, this Court recognized that, if the Railway Labor Act confers upon a union designated as an exclusive representative[29] the plenary power

> to create the seniority rights of [minority] employees and to destroy them * * * without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross * * *, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its

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[26] *Id.* at 1529.

[27] *Id.* at 1530.

[28] *See id.* at 1530, 1532, 1533.

[29] Under Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth.

> power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on [minority employees] the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the [union's] own members, we must decide the constitutional questions * * * .[30]

In the instant case, the right of petitioners upon which ALPA has infringed is also of *constitutional* dimension: to wit, the First-Amendment right of nonassociation with a union in its concerted activities (a strike)—in retaliation for the exercise of which right ALPA discriminatorily negotiated a reduction in petitioners' seniority.[31]

And, contrary to the apparent assumption of the Court of Appeals, nothing is clearer than that the invocation of mere

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[30] 323 U.S. at 198-99. *Accord*, *id.* at 208 (Murphy, J., concurring):

> The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority * * * the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment * * * .

[31] This right of nonassociation is also protected under the Railway Labor Act itself. *See* § 2, Fourth, 45 U.S.C. § 152, Fourth.

labels or slogans cannot control the decision of legal issues of constitutional dimension.[32]

B. *Second*, the particular slogans reliance on which the Court of Appeals preferred to discursive reasoning are legally and factually inane.

◆ *"Majority rule"*. "[O]ne of the premises of the Railway Labor Act", the Court of Appeals intones, "is that unions act democratically to reach a collective decision—the majority is entitled to prevail."[33] In *Steele*, this Court made clear that the Railway Labor Act does *not* contemplate unlimited "majority rule": "While the majority of the craft chooses the bargaining representative, when chosen it represents, as the [Railway Labor] Act by its terms makes plain, the craft or class, and not the majority."[34] Thus, although a union may arguably be selected as the exclusive representative by a majority among the employees of union members promoting their own self-interest as such, the union *qua* representative must prescind from its or its members' merely institutional interests—just as a "democratically" elected legislature, arguably put into office by the votes of greedy special-interest groups, must nevertheless abide by the constitutional requirement to give equal protection to all, not just to its political supporters or clients.

◆ *"Union solidarity"*. "Unions have been authorized", says the Court of Appeals,

> to use the tools of cartels, * * * including dealing with "cheaters." Whatever undercuts concert among labor

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[32] *E.g.*, City of Madison, Joint Sch. Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976); Riley v. National Fed'n of the Blind, 487 U.S. 781, 795-96 (1988).

[33] 981 F.2d at 1531.

[34] 323 U.S. at 202.

> reduces the effective wage unions can secure. Managers try to undermine labor's position by divide-and-conquer tactics: by individual negotiations, by favors for their friends. To say that the union acts in "bad faith" or "discriminatorily" when it attempts to shore up the solidarity of labor by eliminating the distinctions managers try to introduce is to curb an important tool by invoking a slogan.[35]

But even the Court of Appeals recognizes that this rhetoric is overblown.[36]

In any event, the "solidarity-of-labor" concept is inherently flawed, because it derives from the long-discredited Marxian "class-warfare" doctrine that economic life is an irreconcilable struggle between two monolithic antagonists, "labor" (represented by unions) and "capital" (represented by management). In fact, the real relationship between employers and employees is ultimately symbiotic, not antipathetic. And, to the extent conflict exists, it is trinitarian, not dualistic—involving organized employees, unorganized employees, and managers, with the truly permanent enmity between employees who desire to act as individuals or in voluntary groups, and employees who want to

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[35] 981 F.2d at 1532-33.

[36] "There are limits on what labor can do in response to management. Unions may not shoot strike–breakers, and we may assume that they may not negotiate for wage scales the mirror image of managers' preferred systems (that is, a collective bargaining agreement may not provide that workers who respected the picket like, or joined the union, receive a premium over others)." *Id.* at 1533. The Court of Appeals does not explain why in this case it was "rational" for ALPA to negotiate for a seniority system "the mirror image of" the system that United and the fleet qualified pilots preferred.

politicize labor relations through some species of rigid collectivism.[37]

Moreover, contrary to the Court of Appeals, managers may not "undercut[ ] concert among labor" and "undermine labor's position by divide-and-conquer tactics" while a union represents the employees.[38] And before the union is the exclusive representative, when managers may freely deal with individual workers, there is no *"cartel"*, and "concert among labor" is a collectivistic daydream—for employees act on their own behalf, and not through the intermediation of a union, precisely because they recognize a *disparity* of interest between themselves as individuals and other workers "concerting" in a "cartel". Thus, the Court of Appeals' gratuitous defamation of the fleet qualified pilots as "cheaters" because they chose to pursue their own self-interest is economically and legally unwarranted.

In this case, the "distinctions" in seniority favorable to the fleet qualified pilots that ALPA sought to eliminate in revenge for their refusal to support its strike were introduced by agreement between United's managers and individual pilots who were then entitled to act on their own, for their own ends. By stripping the fleet qualified pilots of these benefits for the gratification of the Group of 570, ALPA bolstered not "*labor* solidarity", but only "*union* solidarity"—penalizing the fleet qualified pilots precisely because they refused to salivate as docile lapdogs when ALPA rang the bell calling them to strike. Such action—if this Court allows ALPA to get away with it—may terrorize employees into compliance with the union's future

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[37] *See, e.g.*, W.H. Hutt, *The Strike-Threat System: The Economic Consequences of Collective Bargaining* (1973); G.R. Velasco, *Labor Legislation from an Economic Point of View* (1973).

[38] *E.g.*, Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944)(Railway Labor Act); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)(National Labor Relations Act); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944)(National Labor Relations Act).

ukases. But eviscerating the DFR in order to license ALPA to reduce the employees it purports to "represent" to cowering cravens is no way to achieve "solidarity", unless that term imports only ALPA's interests as an institution separate from—and indeed, as this case shows, antagonistic to—the interests of those employees.

◆ *"Economic warfare"*. Finally, again relying on the atavistic "class-struggle" ideology that "the weapons of economic warfare usually are matched", the Court of Appeals asks whether, "[i]f managers may tempt replacements with premium wages and super-seniority, * * * may the union not try to take these favors away?"[39] The Court of Appeals forgets, however, that the replacements in this case were dealing *for themselves as individuals* during the strike. As far as they were concerned, notions of "economic warfare" were beside the point: which was to obtain employment in the face of ALPA's attempt to shut down the airline. When ALPA later on purported to "represent" these pilots, it was required to treat them, not as "*enemies*" (the Court of Appeals' malediction[40]), but as individuals entitled to demand the maximum benefits ALPA could negotiate consistent with the rights of others in the unit. Nothing but the rancor and vindictiveness of its leadership, and the leadership's desire to placate the Group of 570 for internal political reasons, prevented ALPA from leaving the fleet qualified pilots in the favorable position as to seniority in which it found them. Thus, if this case evidences "economic warfare", it involves a fight between ALPA and its members, on the one side, and the fleet qualified pilots, on the other side—a conflict in which, supposedly, the DFR shields individual employees from the back-stabbing of their "representative".

In sum, if slogans such as these may control the outcome of DFR cases by allowing courts to deem as "rational" unions'

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[39] 981 F.2d at 1532.

[40] *Id*. (emphasis in original).

actions taken for discriminatory reasons and in bad faith, then the DFR is truly "a tale told by an idiot, full of sound and fury, signifying nothing"—and the constitutionality of the Railway Labor Act's scheme of exclusive representation is open to serious question.

IV. The Court of Appeals may not use a mere "rational-basis" test where ALPA's discrimination and bad faith were proven.

The Court of Appeals holds that ALPA may prefer the Group of 570 to the Group of 539 "provided only that a rational person might believe that the[ ] distinction[ ] serve[s] the interest[s] of the [bargaining-unit] as a whole. * * * Slapping the label 'bad faith' or 'discrimination' on a classification that is rationally related to a legitimate objective does not alter the analysis".[41] This holding is doubly flawed.

A. *If* a "rational-basis" test is appropriate where the violation of the DFR implicates only "arbitrary" union conduct, such a test is clearly out of place where the violation rests on invidious discrimination or bad faith—as here, where the violation arises out of ALPA's discrimination against the fleet qualified pilots because of their nonassociation with its strike, and the union's bad-faith refusal to abide by its previous agreement with United so as to wreak vengeance on those employees who refused to dance to its tune.

As this Court early explained,

> the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give

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[41] *Id.* (citation omitted).

> equal protection to the interests of those for whom it legislates.[42]

Where a legislature discriminatorily infringes on *fundamental* rights—such as the First-Amendment right of nonassociation, though, the Constitution imposes two prerequisites to the validity of its action: (i) that the discrimination serve a *compelling* governmental interest; and (ii) that the particular means the legislature employs to serve that interest be *least-restrictive* of the rights of the individuals adversely affected.[43]

Here, ALPA's "renegotiation" of the seniority-rights of the fleet qualified pilots was, as to them, a penalty for their refusal to associate with ALPA during the strike; and, as to the Group of 570, a reward for such association. Thus, ALPA predicated its discrimination on the exercise *vel non* of the First-Amendment right of nonassociation. For that reason, it must justify its action *(if justification be possible)* by a higher level of proof than a mere "rational basis"[44]—which, of course, it has not done.[45]

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[42] Steele, 323 U.S. at 202.

[43] *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 257-58 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330, 339-41 (1972); Shapiro v. Thompson, 394 U.S. 618, 628-31 (1969).

[44] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388-89 (1987); Thomas v. Review Bd., 450 U.S. 707, 719 (1981); Elrod v. Burns, 427 U.S. 347, 368 (1976)(plurality opinion); DeGregory v. Attorney General, 383 U.S. 825, 829-30 (1966); NAACP v. Button, 371 U.S. 415, 444 (1963).

[45] "If justification be possible" warrants emphasis, because, if ALPA's discrimination against the fleet qualified pilots is seen as purposefully intended to penalize the past and deter the future exercise of their fundamental freedom of nonassociation, then ALPA's conduct must be a *per se* violation of the DFR. *See, e.g.*, Shapiro, 394 U.S. at 631, *citing* United States v. Jackson, 390 U.S. 570, 581 (1968).

B. The Court of Appeals' reliance on a "rational-basis" test also fails, because (even if not pretextual) ALPA's alleged purposes in renegotiating the pilots' seniority are not legitimate.

◆ *First*, the Court of Appeals says, ALPA acted "to reduce the advantages enjoyed by the replacements, and thus to strengthen the hand of organized labor in future conflicts with management", thus "shor[ing] up the monopolistic quality of organized labor".[46] This proves too much, as *any* discrimination against nonunion employees or dissident union members in a bargaining-unit would, as an *in terrorem* tactic, predictably "strengthen the hand of organized labor". Moreover, no principled distinction exists between terror-tactics designed to cow employees into slavishly following the union's *diktats*, and "organizing" activities aimed at wooing nonmembers to support the union willingly. Yet, this Court has held that Railway Labor Act unions may not require nonmembers to pay "agency fees" to defray the unions' cost of organizing,[47] and that a union violates the DFR by charging an excessive agency fee.[48] Thus, that discriminatory conduct may "shore[ ] up the monopolistic quality of organized labor" is no defense to a charge of violating, but rather an affront to, the DFR.

◆ *Second*, the Court of Appeals adds, ALPA acted "to restore the seniority system that United had long used."[49] This assumes without proof that the old seniority system had some utility independent of its use as a means selectively to punish the fleet qualified pilots. Yet ALPA's 1987 agreement with United, in which the union pledged never again to challenge the Group of 570's seniority-status, waived any claim ALPA might have

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[46] 981 F.2d at 1535.

[47] Ellis v. BRAC, 466 U.S. 435, 451-53 (1984).

[48] CWA v. Beck, 487 U.S. 735 (1988)(National Labor Relations Act).

[49] 981 F.2d at 1535.

advanced that the earlier system was somehow sacrosanct, as well as evidencing its bad faith.[50]

V. The Court of Appeals' reliance on a "rational-basis" test is improper in a "mixed-motives" case such as this.

Finally, the Court of Appeals errs in employing a mere "rational-basis test" where the DFR violation involved at best "mixed motives" on ALPA's part.

The Court of Appeals too easily concludes that "ALPA had mixed motives. It wanted to harm the replacements, but it also wanted to restore the normal seniority arrangements at United".[51] For, although ALPA's motive "to harm the replacements" the evidence overwhelmingly confirms, its alleged motive "to restore the normal seniority arrangements", *as something independent of retaliation against the replacements*, the evidence does ***not*** substantiate. Indeed, quite the contrary: "the evidence clearly demonstrates that ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly".[52] So, if this is truly a "mixed-motives" case *where ALPA has an arguably innocent motive*, ALPA has yet to prove it.

The Court of Appeals then argues that

> a "bad" motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union. The 219 fleet quali-

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[50] As the District Court found. 765 F. Supp. 474, 493 n.14 (N.D. Ill. 1991).

[51] 981 F.2d at 1534.

[52] 765 F. Supp. at 491 (footnote omitted).

> fied pilots fared no worse than the 320 trainees, and both the 570 and the 539 received seniority slots that would have been forthcoming under United's pre-strike practices."[53]

That ALPA's sacrifice of the seniority-rights of the fleet qualified pilots "serve[d] the interests of workers as a whole" is plausible only by taking *ALPA's institutional interests* as a proxy for the interests of the "workers as a whole", which the DFR does not allow. Moreover, that ALPA sacrificed some of its own adherents in its rabid campaign to crush the "reviled" fleet qualified pilots proves nothing about the even-handedness of its actions. As "supporters of the union", the sacrificial lambs could have viewed their immolation as an institutional benefit for their union—"shor[ing] up the monopolistic quality of organized labor" (in the Court of Appeals' words)—and therefore as an overall benefit for themselves. The fleet qualified pilots, conversely, suffered a loss unmitigated by the psychic gain of marching as willing cannon-fodder on the battlefield of "class warfare". So, the 320 trainees and the 219 pilots are not at all "similarly situated".

Rather than employing a "rational-basis" test, the Court of Appeals should have recognized two things:

- *First*, because ALPA was at least in part *illegally* motivated, the burden of proof shifted to it to show that it would have renegotiated the seniority-rules for a reason unrelated to retaliation against the fleet qualified pilots.[54]

- *And second*, having failed to make such a showing, ALPA had no defense on that score.

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[53] 981 F.2d at 1535.

[54] *See* NLRB v. Transportation Management Corp., 462 U.S. 393, 398-404 (1983).

CONCLUSION

This case continues the tradition of crabbed misconstruction of the DFR on the part of ALPA and the Court of Appeals for the Seventh Circuit that this Court has criticized before[55]—with the added danger that, if not nipped in the bud, the Court of Appeals' adoption of a "mere-rationality" test in cases of discrimination and bad faith may spread, predictably demolishing the DFR as a meaningful protection for nonunion and dissident union-member employees. At that point, fifty years of jurisprudence, since *Steele* in 1944, will be set at nought; and this Court will be faced with an host of petitions attacking the constitutionality of a scheme of exclusive representation that licenses unions to trample roughshod over the rights of those whom they purport to "represent".

Better to scotch the snake now. The petition should be granted.

Respectfully submitted,

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[55] O'Neill, __ U.S. at ___, 111 S. Ct. at 1134.